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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1946

No..... 453

THE PENFIELD COMPANY OF CALIFORNIA AND A. W. YOUNG,

Petitioners.

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

Petition for Writ of Certiorari and Brief in Support Thereof.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles 14,
Attorney for Petitioners.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Respondent,

PETITION FOR WRIT OF CERTIORARI

Your petitioner, A. W. Young, and the Penfield Company of California, petition for a writ of certiorari from a judgment and order of the Ninth Circuit Court of Appeals, reversing a judgment of the District Court of the United States against the petitioner, A. W. Young, in which the petitioner was fined $50.00 for contempt of court.

Opinion of Court.

The opinions and amendments of the Circuit Court of Appeals for the Ninth Circuit is unreported but is contained at page 95-99 of the record. Except an additional supplement to opinion filed Aug. 27, and is in appendix to this brief.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes, and by the Securities and Exchange Act of 1933, Title 15, Section 77v(a). The judgment of the District Court was rendered on July 2, 1945. The Securities and Exchange Commission appealed the judgment and order of the District Court on Sept. 26, 1945, and the Circuit Court of Appeals reversed the order of the District Court on June 25, 1946. [R. 95.] A petition for rehearing was duly and regularly filed in the Ninth Circuit Court on July 12, 1946, by the Appellee, and denied by the Ninth Circuit Court on July 16, 1946. One of the three justices dissented from the majority opinion.

The Facts.

During an investigation by the Securities and Exchange Commission, an officer of the Los Angeles office of the Commission subpoenaed certain books and records of the Penfield Company of California, consisting of twenty items named in the subpoena. [R. 12.] The subpoena was resisted for want of jurisdiction in an independent proceeding and heard and tried by the District Court, which found in favor of the Securities and Exchange Commission, and issued an order for the production of the books and records as subpoenaed. The order was appealed from and was affirmed by the Ninth Circuit Court of Appeals. 143 F. (2d) 746, Certiorari denied 323 U. S. 768.

Certiorari was denied by the United States Supreme Court.

In the meantime, however, the grand jury had returned an indictment against the defendant and others, and during the trial of the case, the Government produced, through one of the defendants against whom the case was dismissed and who had been a President of the Penfield Company of California, and who thereafter became a witness for the Government in the trial, most of the documents and records sought for in the subpoena *duces tecum* previously requested by the Securities and Exchange Commission.

The criminal trial ended in acquittals of the defendants and thereafter the defendant Young was brought back into court to show cause why he should not be punished for contempt of court for disobedience of the subpoena of the Securities and Exchange Commission.

It appeared that some time prior to January 24, 1945, [the letter is dated January 16, 1945, R. 9], Mr. Burr, an officer of the Securities and Exchange Commission at Los Angeles, sent a letter to the Penfield Company at the address 2427 South Robertson Boulevard, (this was not the address of the Penfield Company) [R. 83], saying that Mr. Burr would present himself at the offices of the Penfield Company on January 24, 1945. The offices of the Penfield Company were at 8900 Beverly Boulevard, Los Angeles. Young and his wife were out of the city at the time and were not back in the city until February. There was no subpoena or any other notice served on Mr. Young personally, other than the sending of the letter, which did not reach the appellant Young, at any time prior to January 24, 1945, and so far as the record shows, at any time. The affidavit of the appellant Young indicates he was absent from the city

from January 11, 1945, to February 3, 1945. The trial court considered whether mere absence from the city after the sending of the letter was sufficient to exculpate him from the order, and held it was not. It was also shown that his counsel also was absent from the city during this period of time. [R. 82.]

The letter of Mr. Burr that he would call at the office of the Penfield Company on January 24, 1945 [R. 9], does not state that Mr. Burr made any demand at the offices for the papers or that he would do anything other than appear at the offices for the purpose of examining the books and records referred to in the order of Judge Hall.

The affidavit on which the first proceedings in contempt were predicated was dated January 23, 1945 [R. 93, 94], or one day prior to the date when the appearance of Burr was made. The subsequent affidavit of Charles R. Burr [R. 6, 7], does not state that when he appeared at the office of the Penfield Company in Los Angeles (without mentioning any address) that he saw Mr. Young or that Mr. Young was there, or that Mr. Young refused him access to the papers. Everything stated in the affidavit is consistent with the fact that the letter on which the proceedings were based never reached Mr. Young, but Mr. Young had no knowledge that an inspection was to be demanded nor that they made the demand of him nor that he refused such demand.

It was shown that at the time the letter was sent and continuing throughout the period mentioned that neither the defendant nor his counsel were present in the city of Los Angeles nor did they receive the letter nor did they know of its contents. [R. 82.] This was the

only attempt made by the Securities and Exchange Commission to secure the records and they proceeded to hale the petitioner into court for disobedience of the order made pursuant to their failure to see the books, upon the basis of the letter which had not been received by petitioner or his counsel prior to that date. In fact, petitioner's counsel was in Washington, D. C., presenting a case on behalf of the Mexican Government and was having considerable trouble on account of transportation in getting back to Los Angeles, and the petitioner was also out of the city during this entire time on business.

When the matter was before the court, all that the attorney for the Securities and Exchange Commission said was:

> "So far as the punishment which the court might see fit to impose, that is up to the court. We are still anxious to get a look at these books and records so I suggest to the court, if he be so disposed, whatever punishment the court might see fit to impose would be in connection with or so long as he refuses to produce his books and records for our inspection." [R. 86.]

The court, nevertheless, found the petitioner guilty of contempt and fined him $50.00. The petitioner paid the fine and did not appeal. [R. 87.]

The Securities and Exchange Commission, after waiting from July 2, 1945, filed notice of appeal on September 26, 1945. [R. 23.] The Circuit Court of Appeal, one judge dissenting, reversed the judgment of the District Court and made a new order requiring imprisonment of Young to compel his obedience to the order to produce documents. Nothing was done about the fine already paid into the United States Treasury. [R. 98.]

Questions Presented by This Appeal.

1. Where a District Court having jurisdiction of the person and the subject matter regarding his previous order to produce certain books and documents on behalf of the Securities and Exchange Commission has made an order finding a defendant guilty of contempt for refusal of his order, and imposing a monetary fine of $50.00, which was paid, is the jurisdiction of the court exhausted, and may the Circuit Court of Appeals substitute and require the District Court to make an additional order in respect to the case on an appeal by the administrative agency?

2. Where a District Court has made an order to a secretary of a corporation to produce certain books and records, which order is affirmed on appeal, is the mere sending of a letter, without personaal service, to the secretary of the corporation and to his counsel, both of whom are out of the city, a sufficient predicate for a finding and determination of contempt, where it is not shown that the secretary or his attorney ever received the letter at the time designated in the letter for the proposed inspection, nor that the secretary of the corporation refused to obey any command as contained in the letter nor refused to abide by any order of the court?

3. Where a request is made for certain books, records and documents by the Securities and Exchange Commission covering a period from the commencement of the corporation to June 1, 1943, is such a demand a moot question more than three years after the period covered by the order, and after the corporation has ceased actively to function.

4. Where matters demanded by the Securities and Exchange Commission in an order for a *subpoena duces tecum*

to the secretary of the corporation are produced by other witnesses in a criminal trial before a district court judge, and that judge has judicial knowledge that nearly all of the matters designated in the previous order for *subpoena duces tecum* have been produced before him in a lengthy criminal trial, may he consider all of those matters which occurred before him in such criminal trial in reaching his decision on the disposition of the contempt proceedings?

5. Can the Securities and Exchange Commission compel the court to impose a different punishment than the court determines as proper in the case?

Reasons for Allowing the Writ.

I.

The case raises a question of extreme importance in the administration of the law of contempt in relation to administrative agencies.

Nearly every statute relating to administrative agencies contains provisions for the court to enforce the orders if they are deemed proper and to make such punishment as it, the court, sees fit to make. The decision of the Circuit Court puts this power in the hands of the administrative agency, contrary to the intent of Congress that that function was to be performed by the District Courts. It made a rubber stamp out of District Judges for the administrative agencies.

II.

The issue is raised as to whether the payment of a fine has exhausted the jurisdiction of the court and, therefore,

whether the decision of the Circuit Court is not in conflict with the recent decision of this court in *In re Bradley*, 318 U. S. 50, 87 L. Ed. 608.

III.

The decision of the Circuit Court is in conflict with decisions of this Honorable Court and in conflict with the law of contempt set forth in the statutes and applicable cases. The decision of the Circuit Court would substitute its judgment for that of a trial court, and tell the trial court what order or judgment it should impose in the case. This is contrary to the provisions of Section 19(b), Securities and Exchange Act of 1933, 15 U. S. C. 77 and 77(v)(b).

Stewart v. United States, 236 Fed. 838;

Ex Parte Grossman, 267 U. S. 87, 69 L. Ed. 527;

Gompers v. Buck Stove and Range Co., 221 U. S. 418, 55 L. Ed. 797;

Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872;

In re Bradley, 318 U. S. 50, 87 L. Ed. 608.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

ARGUMENT.

I.

The Writ of Certiorari Should Be Granted to Determine Important and Fundamental Questions of the Law of Contempt With Relation to Administrative Agencies. The Decision of the Circuit Court for the Ninth Circuit Is in Conflict With and Contrary to the Statutes and Laws Applicable Thereto.

The Circuit Court of Appeals' decision is contrary to the provisions of Title 15, Section 77V(b) which provides *punishment* by the District Court in its discretion for a contempt thereof. The order and decision of the Circuit Court would now make a rubber stamp out of the District Court for Administrative Agencies and leave no right or

discretion in the District Court to impose the punishment which it saw fit to impose, and would enable every administrative agency to compel the District Court to impose such punishment and order as the administrative agency wished. The determination of the law on this subject is therefore a matter of extreme importance and should be determined by this Honorable Court.

Re Debs, 158 U. S. 564;

New Orleans v. N. Y. Mail Steamship Co., 20 Wall. 387-403 and cases therein cited.

In *Crosby's Case,* 3 Wils. 188, Mr. Justice Blackstone said:

> "The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interference to each respective court."

In *Bessette v. W. B. Conkey Co.,* 194 U. S. 324, 48 L. Ed. 997, the court said that disobedience of a subpoena is among those acts primarily directed against the power of the court, and classes it as similar to misconduct in a court-room. The case also says that "the orders imposing punishment are final" (p. 336).

The petitioner, against whom the punishment was imposed, did not appeal. It was the respondent at whose request the punishment was inflicted, but who was dissatisfied with the type of punishment which the court imposed. Such dissatisfaction does not give jurisdiction to appeal.

In *Fischer v. Hayes,* 102 U. S. 121, 26 L. Ed. 95, the court held that the imposition of a fine for contempt is a judgment.

II.

The Circuit Court Erred in Holding That the Jurisdiction of the District Court Was Not Exhausted Upon the Payment of the Fine Imposed by the District Court, and in Substituting Its Judgment for That of the District Court.

Section 77v(b) provides that in case of contumacy or refusal to obey a subpoena issued to any person, "any failure to obey such order of the court may be punished by said court as a contempt thereof."

The Securities and Exchange Commission Act does not provide what the punishment for contempt should be. The extent of the punishment and the power of punishment, therefore, must be measured *in pari materia* with other sections of the code, to wit, Title 28, Section 385.

It will be noted that the power to punish for contempt is either by fine or by imprisonment, and not both. Having imposed the fine, the jurisdiction of the court is exhausted. Section 77v(b) provides that failure of the person to obey the order of the court may be *punished* as a contempt.

The language of the statute, therefore, provides for punishment in the discretion of the District Court.

The court by way of punishment imposed a fine of $50.00. The imposition of a fine for contempt is a punishment in a criminal action.

New Orleans v. New York Mail Steamship Co., 20 Wall. 387, 22 L. Ed. 354;

Fischer v. Hayes, 6 Fed. 63;
Ex parte Kearney, 20 U. S., 7 Wheat. 38, 5 L. Ed. 391;
In re Mullee, Federal case No. 9911;
Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95;
N. R. Anargyros, 291 Fed. 208.

Where one is punished as for an offense in having wilfully defined the power or authority of a court of the United States by knowingly disobeying an injunction order, he stands as one who has been found guilty of an offense against the United States.

Butte, etc. Consolidated Mining Co. v. Montana Ore P. Co., 158 Fed. 131.

Punishment imposed to uphold the authority of the court for disobedience is for criminal contempt and the penalty is for the benefit of the United States.

The party chiefly interested in the proceeding is the Government or the public. The proceeding is for a criminal contempt.

New Jersey Patent Co. v. Martin, 166 Fed. 1010;
In re Eugene Debs, 158 U. S. 564, 39 L. Ed. 1092;
Bessette v. W. B. Conkey Co., 194 U. S. 324, 48 L. Ed. 997;
In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072;
Garrigan v. U. S., 163 Fed. 16;
Merchants Stock and Grain Co. v. Board of Trade of Chicago, 201 Fed. 20.

III.

The Circuit Court Was Without Power to Order the District Court to Make a Further Order in the Contempt Proceedings.

The District Court only has jurisdiction to find the defendant guilty of contempt where there was a proper predicate to the proceedings showing that there had been a willful disobedience of the court's order. Since the petitioner in this case did not appeal from the original order of the District Court, in view of the fact that he was fined $50.00, and paid the fine, the Circuit Court's order was invalid because it was predicated upon a void order of the District Court.

The record shows that there never has been a disobedience or a refusal by the respondent to any order of the court validly served upon him. The affidavit of Charles R. Burr carefully refrains from stating that he ever served A. W. Young, the Secretary of the Penfield Company of California, with any order demanding the books on a specific date, or that he was refused any such right as contained in any such court order.

IV.

The Circuit Court Erred in Requiring the District Court to Make an Additional Order to Jail A. W. Young Until He Produces the Documents. Such an Order Invades the Jurisdiction of the District Court and Is Beyond the Jurisdiction of the Circuit Court.

The power of a court to make an order carries with it the equal power to punish for a disobedience of that order and the inquiry as to the question of disobedience is a special function of that court and may not be submitted to another tribunal, be it a jury or another court.

In re Eugene Debs, 158 U. S. 564, 39 L. Ed. 1092;

In re Bradley, 318 U. S. 50;

Garrigan v. U. S., 163 Fed. 16.

The Circuit Court of Appeals took on the functions of the District Court in this case and has virtually made the District Court a rubber stamp for administrative agencies.

V.

Section 77v(b) of Title 15 Only Gives the District Court Power to Punish as Said District Court Sees Fit in Its Discretion. The Circuit Court, by a Two to One Decision, Has Stripped the District Court of the United States of That Discretion.

It is important, therefore, that certiorari be granted by this court in order that a fundamental question of administrative law and the power of the District Court in contempt proceedings may be clarified.

VI.

Jurisdiction of the Court Was Exhausted Upon the Payment of the Fine and It Is Necessary That Certiorari Be Granted in Order That the Conflict Between the Circuit Court of Appeals and the Decisions of This Court in Relation to the Applicable Law of Contempt Be Determined by This Honorable Court.

The decision is directly in conflict with the decision in *In re Bradley,* 318 U. S. 50, 87 L. Ed. 608, and other decisions of this court.

For all of the foregoing reasons, it is respectfully submitted that this very Honorable Court should grant certiorari and reverse the judgment and order of the Circuit Court of Appeals in this case.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioners.

§77v. Jurisdiction of offenses and suits.

s. (b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be *punished* by said court as a contempt thereof.

Title 15, Section 77v(b), United States Code.

APPENDIX.

§77v(a). Jurisdiction of offenses and suits.

(a) The districts courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Title 15, §77v(a), *United States Code Annotated.*

§385. (Judicial Code, section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, *by fine or imprisonment,* at the discretion of the court, contempts of their authority. Such power to pun-

ish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts. (R. S. §725; Mar. 3, 1911, c. 231, §268, 36 Stat. 1163.)

Title 28, Section 385, United States Code.

United States Circuit Court Appeals for the Ninth Circuit.

Securities and Exchange Commission, Appellant, vs. The Penfield Company of California and A. W. Young, Appellees. No. 11173.

ORDER.

Upon Appellant's Motion to Shorten Time for Issuance of Mandate, Submitted on Notice Without Opposition.

Before: Denman, Matthews and Orr, Circuit Judges.

It is ordered that there be added to the sixth line from the bottom of page 2 of our opinion filed herein on June 25, 1946, the following:

> "In the cases cited by appellees the petitioners were not, as here, seeking a civil remedy. In *ex parte* Lang, 18 Wall. 163, petitioner was convicted of a crime. In *In re Bradley*, 318 U. S. 50, he was sentenced for a criminal contempt. In neither had there been denied to the opposing litigant a civil remedy to which he was entitled."

The motion to shorten time for issuance of Mandate is granted.

WILLIAM DENMAN,
United States Circuit Judge.

WM. E. ORR,
United States Circuit Judge.

[Endorsed]: Filed August 27, 1946. Paul P. O'Brien, Clerk.